

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



ORIGINAL

**76-7540**

To be argued by  
VICTOR S. CICHANOWICZ

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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S. M. PIRES and VIRGINIA PIRES, his wife,

*Plaintiffs-Appellants,*

*against*

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and  
FROTA OCEANICA BRASILEIRA, S.A.,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF N.Y.

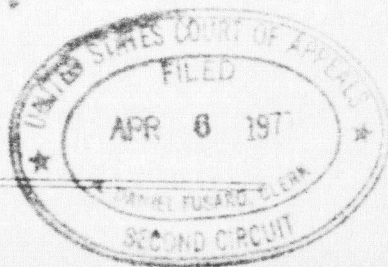
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**BRIEF OF DEFENDANT-APPELLEE FROTA  
OCEANICA BRASILEIRA, S.A.**

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## **BRIEF OF DEFENDANT-APPELLEE FROTA OCEANICA BRASILEIRA, S.A.**

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### **The Issues on Appeal**

1. Whether the Court was correct in dismissing the action of the plaintiffs against Frota Oceanica Brasileira, S.A. on the grounds that it lacked jurisdiction over the subject matter of the action because the plaintiffs and defendant Frota Oceanica were all citizens of the Republic of Brazil and the action, therefore, did not satisfy the diversity requirements of Section 1332 of Title 28 U.S.C.A.

There are no other issues before this Court on this appeal. The appeal from the order to transfer the action against Chicago, Rock Island & Pacific R.R. Co. pursuant to Section 1404(a) of 28 U.S.C.A. was dismissed by this Court on March 1, 1977 on the grounds that it was a non-appealable order. Since the District Court had dismissed the action as to Frota Oceanica Brasileira, S.A., Frota's motion made in the alternative to transfer the action to the United States District Court for the Southern District of Texas, Galveston Division, was not reached by the District Court.

### **The Nature of the Case**

This is an action by an alien seaman and his wife, both of whom are citizens and subjects of the Republic of Brazil, to recover damages for personal injuries which were sustained ashore by the husband, S. M. Pires, on December 11, 1975 in Galveston, Texas when he was struck by a railroad car which backed up across a public street on tracks which intersected said public street.

The plaintiff, S. M. Pires was a merchant seaman employed aboard the M/V Frotaeste, a Brazilian flag vessel which was owned by Frota Oceanica Brasileira, S.A., a Brazilian corporation.



### **The Course of Proceedings and Disposition in the Court Below**

The plaintiffs initially instituted this action against Chicago, Rock Island & Pacific R.R. Co. in the Supreme Court of the State of New York, County of New York. In the complaint, it was claimed that the railway car which struck the plaintiff was owned and operated by Chicago, Rock Island & Pacific R.R. Co. and that it suddenly and without warning backed up and struck the plaintiff.

Following the institution of the action in the Supreme Court of the State of New York, County of New York, Chicago, Rock Island & Pacific R.R. Co. removed said action to the United States District Court for the Southern District of New York and filed a motion pursuant to Section 1404(a) of 28 U.S.C.A. to transfer the action to the United States District Court for the Southern District of Texas, Galveston Division. While said motion was pending, the plaintiffs served an amended complaint. In said amended complaint, they joined Frota Oceanica Brasileira, S.A. as a party defendant and asserted a cause of action against Frota Oceanica Brasileira, S.A. only under the General Maritime Law. Thereafter, they served a cross-motion to remand the action to the Supreme Court of the State of New York, County of New York on the grounds that since both plaintiffs and the defendant Frota Oceanica Brasileira, S.A. were aliens and citizens of the Republic of Brazil, complete diversity between the plaintiffs and defendants was lacking and contended that the United States District Court, therefore, lacked jurisdiction over the subject matter of the action.

Defendant Frota Oceanica Brasileira, S.A. moved to dismiss the complaint as to it for lack of jurisdiction over the subject matter and for failure of the complaint to state a claim upon which relief can be granted, or, in the alternative, for transfer of this action to the United States Dis-

trict Court for the Southern District of Texas, Galveston Division pursuant to 28 U.S.C. Section 1404(a).

Following argument before the Honorable Lee P. Gagliardi, the Court granted defendant Frota Oceanica Brasileira, S.A.'s motion to dismiss for lack of jurisdiction over the subject matter. It did not reach defendant Frota's motion to dismiss for failure of the complaint to state a claim upon which relief could be granted, or the motion in the alternative to transfer. The Court granted the motion of Chicago, Rock Island & Pacific R.R. Co. to transfer and denied the motions of the plaintiffs.

The plaintiffs then proceeded by Order to Show Cause to stay the transfer of the action with respect to Chicago, Rock Island & Pacific R.R. Co. pending appeal. It was denied by Judge Gagliardi for lack of merit. This was followed by an application for a stay by Order to Show Cause to this Court. This too was denied.

Following the filing of a notice of appeal, the attorneys for the respective parties hereto entered into a stipulation with respect to the documents which would be made part of the record on appeal. This became necessary because the Court's file in the matter had been transferred to the United States District Court for the Southern District of Texas, Galveston Division. Instead of including the documents stipulated to plaintiffs included only certain of these documents, omitted others and added documents which were not stipulated to.

Chicago, Rock Island & Pacific R.R. Co. thereupon made an application to this Court for an order dismissing the appeal for failure of the plaintiffs-appellants to comply with Rule 30 of the Federal Rules of Appellate Procedure, or in the alternative, for an order (a) requiring plaintiffs-appellants to file a complete record on appeal in conformity with the written stipulation and striking from the appendix of the plaintiffs-appellants those portions



which were not a part of nor which had been stipulated as constituting a part of the record on appeal. Defendant Frota Oceanica joined in this motion.

On argument of the motion, this Court dismissed the action as to Chicago, Rock Island & Pacific R.R. Co. on the grounds that it was not an appealable order. On the representation of the attorney for the plaintiffs-appellants that he would include the omitted documents in the appendix, this Court held that portion of the motion to be moot. It, however, granted the motion to strike the portion of the appendix which had not been stipulated to.

To date, no amended appendix has been filed.

### **POINT I**

**The Court was correct in dismissing the action against Frota Oceanica Brasileira, S.A. for lack of civil action jurisdiction.**

It is well settled that in order for a District Court to have original jurisdiction of a civil action, it is necessary that the matter in controversy exceed the sum or value of \$10,000.00 exclusive of interest and costs and either (1) arise under the Constitution, laws or treaties of the United States or (2) involve parties of diverse citizenship.

Section 1331(a) of Title 28 United States Code provides:

“(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.”

Section 1332 of Title 28 United States Code provides:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—



- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties. \* \* \*

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: \* \* \*

The only claims which the plaintiffs-appellants asserted against Frota Oceanica Brasileira, S.A. in their complaint was under the General Maritime Law. Throughout all of the proceedings before Judge Gagliardi they made no claim under any other law or statute and maintained that because they and Frota Oceanica Brasileira, S.A. were citizens of Brazil the requisite diversity between all of the plaintiffs and defendants was lacking and that, therefore, the suit should have been remanded to the Supreme Court of the State of New York, County of New York.

In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the United States Supreme Court held that the Constitution or laws of the United States do not comprehend claims under the General Maritime Law and that, therefore, in the absence of diversity of citizenship, the District Court lacked jurisdiction over the subject matter. The trial Court, therefore, was correct in dismissing the plaintiffs' action against Frota Oceanica Brasileira, S.A. because their claim did not satisfy the diversity requirements of 28 U.S.C. Section 1332. *Trinanes v. Schulte*, 311 F. Supp. 812, 813-14 (S.D.N.Y. 1970); *Karakatsanis v. Conquistador CIA. Nav., S.A.*, 247 F. Supp. 423, 426 (S.D.N.Y. 1965); *Rader v. Manufacturers Cas. Ins. Co.*, 242 F.2d 419 (2 Cir. 1957); *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615 (2 Cir. 1955).

## POINT II

**The Court was correct in dismissing the action against Frota Oceanica Brasileira, S.A. for lack of admiralty jurisdiction.**

As the Court below pointed out, the tort which caused plaintiff's accident resulted from his being hit by a railroad car while crossing freight tracks on the way to the city of Galveston and not, even if true, the failure to instruct on a safe means of egress. There was no claim that the railroad car was owned or operated by defendant Frota Oceanica Brasileira or that the premises on which the accident occurred was in any way in the possession of or under the control of this defendant. It, in fact, was a public street beyond the port facilities at which the vessel on which plaintiff, S. M. Pires was employed was docked. Nor was there any claim that the railroad car was in any way connected with any maritime activity.

It is not sufficient as the Court held that the alleged tort with which the defendant Frota Oceanica is charged, which is denied, occurred on navigable waters under these circumstances to establish maritime jurisdiction. As the Court pointed out in *Spearing v. Manhattan Oil Transportation Corporation*, 375 F. Supp. 764, 772 (S.D.N.Y. 1974) under the General Maritime Law, a shipowner is liable to its seaman employee for the unseaworthiness of its vessel or appurtenant appliances which proximately cause the injuries. The shipowner does not warrant the seaworthiness, as in this case, of a public street. Nor, as the Court held in *Dangovich v. Isthmian Lines, Inc.*, 218 F. Supp. 235, 238 (S.D.N.Y. 1963) aff'd 327 F.2d 355 (2 Cir. 1964), is it a duty or within the scope of a ship's officers employment to instruct other employees as to methods of egress and access to the vessel.

Thus, as the Court below held, for an act to be cognizable as a tort within admiralty jurisdiction it is necessary



that the tortious wrong not only occur on navigable waters, but that the wrong also bear a significant relationship to traditional maritime activity involving navigation or commerce on navigable water.

Since the plaintiffs' claim against Frota Oceanica, even if it was true and was not claimed in an attempt to defeat the District Court's diversity jurisdiction, does not meet these tests the claim against Frota Oceanica was properly dismissed. Venue and choice of forum cases are not relevant as those issues were not reached by the Court below and are not an issue on this appeal.

### POINT III

**Plaintiffs' failure to comply with the federal rules of appellate procedure requires dismissal of the appeal.**

This Court, on March 1, 1977 held that because of the representations of plaintiffs' attorney that portions of the appendix which had been stipulated to but not included would be filed, the motion to dismiss was moot. The plaintiffs have, however, failed to comply with their representations. Under these circumstances, it is respectfully requested that the appeal be dismissed. *United States v. One Motor Yacht named Mercury*, (1 Cir. 1975) 527 F.2d 1112, 1113; *Elting v. Sander* (7 Cir. 1971), 447 F.2d 593, 595; *Braniff Airways Inc. v. Curtis-Wright Corp.* (2 Cir. 1969), 411 F.2d 451, 455; *Morrison v. Texas Co.* (7 Cir. 1961), 289 F.2d 382, 384.

**CONCLUSION**

**The decision of the Court below dismissing the action as to Frota Oceanica Brasileira, S.A. should be affirmed.**

Respectfully submitted,

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*Frota Oceanica Brasileira, S.A.*

VICTOR S. CICHANOWICZ  
JOSEPH A. ASCIONE  
*Of Counsel*

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One and closely attached of Two copies  
of the within BRIEF is hereby  
submitted this 6TH day of APRIL 1977

.....  
Attorney for APPLICANTS

RECEIVED

APR 6 1977

KENNETH HELLER, ESQ.